

## II. THE COURT'S REFUSAL TO APPLY HEIGHTENED SCRUTINY TO THE STATE'S IMPAIRMENT OF ITS OWN CONTRACTS WARRANTS FURTHER REVIEW.

This Court invariably has applied heightened Contract Clause scrutiny where a State impairs its own contracts. Pet. 15 (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977); *United States v. Winstar Corp.*, 518 U.S. 839, 876 (1996) (plurality opinion); and other cases). The Montana Supreme Court, in contrast, applied a deferential rather than heightened standard even though I-137 impaired the State's own contracts. Pet. App. 26a ¶ 45. This Court should consider whether there is justification for creating an exception to the heightened constitutional standard established by *United States Trust* and its progeny.

The State argues that the Montana court was correct to eschew the *United States Trust* standard because the "rationale" for heightened scrutiny applies only where a State's self-interest for impairing its own contract is financial in nature. Resp. 13-14. The State's attempt to distinguish between financial and other forms of self-interest ignores the *Winstar* plurality opinion rejecting such a distinction. See Pet. 17-18. A State will always be acting out of self-interest when it impairs its own contracts. The nature and weight of that interest should be analyzed not to determine the standard for reviewing the impairment but instead to determine whether the State can satisfy that standard. Here, for example, despite the State's disclaimer of financial self-interest, the State has regained primary control of some 9 million ounces of gold deposits. The State's response that it is under the same regulatory constraints that made these deposits "valueless" when held by Petitioners (Resp. 14) ignores that the State now holds the deposits in perpetuity and unlike private parties has the power to restore their value if and when it sees fit to do so.

The State concludes by arguing that applying heightened scrutiny to all State impairments of their own contracts would “prove unworkable” and undercut Justice Holmes’s “observation that ‘[o]ne whose rights ... are subject to state restriction[] cannot remove them from the power of the State by making a contract about them.’” Resp. 17 (quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)). *Hudson* is inapposite because the State there had not impaired its own contract with the complaining party. There is nothing “unworkable” about holding a State to a higher standard – the standard expressly set forth in *United States Trust* – when it impairs its own contracts. *United States Trust* did not apply the Constitution “literally to proscribe ‘any’ impairment” (431 U.S. at 21), but simply required more searching review where the State’s own contracts are the ones impaired.

### CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

Daniel S. Hoffman

*Counsel of Record*

Sean Connelly

Hoffman Reilly & Pozner LLP

511 16th Street, Suite 700

Denver, CO 80202

(303) 893-6100

Alan L. Joscelyn

Gough, Shanahan, Johnson & Waterman

P.O. Box 1715

Helena, Montana 59624

406-442-8560

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**In The  
Supreme Court of the United States**

SEVEN UP PETE VENTURE, an Arizona General  
Partnership, d/b/a SEVEN UP PETE JOINT VENTURE;  
CANYON RESOURCES CORPORATION, a Delaware  
Corporation; JEAN MUIR; DR. IRENE HUNTER;  
DAVID MUIR; ALICE CANFIELD; TONY PALAORO;  
JUNE E. ROTHE-BARNESON; AMAZON MINING  
COMPANY, a Montana Partnership; PAUL ANTONIOLI;  
STEPHEN ANTONIOLI; and JAMES E. JOSKINS,

*Petitioners,*

v.

THE STATE OF MONTANA,

*Respondent.*

**On Petition For Writ Of Certiorari  
To The Montana Supreme Court**

**AMICUS CURIAE BRIEF OF  
MOUNTAIN STATES LEGAL FOUNDATION  
IN SUPPORT OF PETITIONERS**

WILLIAM PERRY PENDLEY\*

*\*Counsel of Record*

JOEL M. SPECTOR

MOUNTAIN STATES LEGAL FOUNDATION

2596 South Lewis Way

Lakewood, Colorado 80227

(303) 292-2021

*Attorneys for Amicus Curiae*

## QUESTIONS PRESENTED

1. Whether the Contracts Clause of the United States Constitution prevents a State from impairing its own contracts when the State denies that the impairment was in its financial self-interest.

2. Whether, regardless of the public purpose involved, the Contracts Clause of the United States Constitution prevents a State from impairing its own contracts.

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**AMICUS CURIAE BRIEF OF MOUNTAIN  
STATES LEGAL FOUNDATION  
IN SUPPORT OF PETITIONERS**

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of the Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.<sup>1</sup>

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**IDENTITY AND INTEREST OF AMICUS CURIAE**

MSLF is a non-profit, membership public interest legal foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in almost every State of the country, including the State of Montana.

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<sup>1</sup> Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

## OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

*Amicus* hereby adopts Petitioners' description of the opinions below, statement of jurisdiction, and statement of the case. See Petitioners' Brief at 1-5.

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## SUMMARY OF THE ARGUMENT

This Court should grant *certiorari* in this case for two reasons. First, the Montana Supreme Court has interpreted an important federal question in a way that conflicts with relevant decisions of this Court and another State Supreme Court. Specifically, clarification is needed to determine the scope of a State's "self interest." Secondly, and more generally, this Court should seize this opportunity to reexamine the entire body of recent Contracts Clause jurisprudence since the current construction of the Clause differs so significantly from its original understanding.

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## ARGUMENT IN SUPPORT OF PETITION

- I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE, INCONSISTENT WITH U.S. SUPREME COURT PRECEDENT AND THE HOLDING OF ANOTHER STATE SUPREME COURT, THE MONTANA SUPREME COURT APPLIED DEFERENTIAL SCRUTINY TO A CONTRACT IMPAIRMENT AND, IN SO DOING, MATERIALLY HARMED PETITIONERS.

The Montana Supreme Court concluded that voter initiative I-137, later codified as Mont. Code Ann. § 82-4-390 (1998), constituted a substantial impairment of the

State of Montana's contract with Petitioners. *Seven Up Pete Venture v. Montana*, 114 P.3d 1009, 1022 (Mont. 2005). It further held, however, that this impairment did not violate the Contracts Clause of the U.S. Constitution because the impairment was reasonably related to a legitimate public purpose. *Id.* at 1025.

**A. Inconsistent With U.S. Supreme Court Precedent And With The Holding Of Another State Supreme Court, The Montana Supreme Court Neglected To Apply The Heightened Scrutiny Standard When Montana Impaired Its Own Contract.**

Although the text of the Contracts Clause<sup>2</sup> suggests that any contractual impairment is a *per se* violation of the Clause, more recent jurisprudence from this Court requires consideration of additional matters. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934). For example, a State is given broad power to impair private contracts "for the general good of the public." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978). Additionally, when a State's own contract is impaired, it "may be constitutional if it is reasonable and necessary to serve an important public purpose." *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977) (invalidating a State legislative action because the legislation impaired a State contract and violated the Contracts Clause). This Court has reasoned that this heightened scrutiny standard should be applied when a State impairs its own contracts "because a State's self interest is at stake." *Id.* at 25-26.

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<sup>2</sup> "No state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1.

The Montana Supreme Court decided that heightened scrutiny ought not be applied here because the contractual impairment was allegedly not in the State's financial self-interest. *Seven Up Pete Venture*, 114 P.3d at 1023. This emphasis on "financial" self interest reveals a conflict amongst State Supreme Court jurisprudence, though it is in accord with various federal circuit courts. See, e.g., *Bailey v. North Carolina*, 500 S.E.2d 54, 66-67 (N.C. 1998) (determining that "complying with a Supreme Court ruling" constitutes a self-interest, thereby implicating the heightened scrutiny standard), but see *Mercado-Boneta v. Administracion Del Fondo De Compensacion*, 125 F.3d 9 (1st Cir. 1997) ("If the state has in fact altered none of its own financial obligations, then the legislative decision deserves significant deference because the state is essentially acting not according to its economic interests, but pursuant to its police powers."), and *Linton v. Commissioner*, 65 F.3d 508 (6th Cir. 1995) (legislative satisfaction of a district court ruling does not warrant heightened scrutiny when the State increased its own financial burden).

This Court, however, never limited the term "self-interest," as used in this context, to "financial self-interest." Instead, it held that "when we speak of governmental 'self-interest,' we simply mean to identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties." *U.S. v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (plurality opinion). Indeed, the overarching "self-interest" behind the unconstitutional contract impairment in *U.S. Trust* is not simply the State's financial interests but also includes matters such as the improvement of mass transportation, energy conservation, and environmental protection. *U.S. Trust*, 431 U.S. 1. This Court has even stated that "[i]n almost every case, the Court has held a governmental unit